Kerajaan Malaysia v Central Strata Sdn Bhd

HIGH COURT (IPOH) — SUIT NO 21NCVC-10 OF 2011
LEE SWEE SENG JC
14 JUNE 2013

Evidence — Hearsay — Document — Non-disclosure of source of information or belief — Whether evidence ought to be rejected as hearsay

Evidence — Presumption — Common cause of business — Presumption to infer and conclude that official acts had been regularly performed in common course of conduct of business and operations of plaintiff — Whether fit and proper case to invoke presumption that judicial and official acts had been regularly performed — Evidence Act 1950 s 114(e)

Revenue Law — Income Tax — Assessment — Notices of assessment — Service of — Failure to pay income tax on grounds of non-receipt of notices — Summary judgment, application for — Whether service of notices of assessment had been validly effected by posting — Income Tax Act 1967 s 145 — Evidence Act 1950

The plaintiff claimed that the defendant taxpayer had failed to pay the whole of the monthly estimates and monthly instalments of income tax for the years of assessment 2002, 2003 and 2004. When the defendant failed to submit its tax returns for the years of assessment 2002-2004 within the time stipulated, the plaintiff proceeded to assess the defendant with income tax for the years of assessment 2002, 2003 and 2004. According to the plaintiff, the three notices of assessment for the said three years of assessment were posted and served on the defendant at its last known address. When the defendant failed to pay the whole of the income tax for the said three years of assessment within 30 days from the date of service of the three notices of assessment, the plaintiff imposed an increase in tax of 10% and 5% on the overall income taxes due and owing. However, the defendant failed to settle the whole of the outstanding income tax. The plaintiff duly commenced an action against the defendant for its failure to pay the whole of the income tax due and owing to the plaintiff for the years of assessment 2002, 2003 and 2004 including the increases imposed which together amounted to RM648,692.40. In response the defendant filed a defence wherein it claimed inter alia that the sum claimed was wrong and that the notices of assessment for the said three years of assessment had not been served and received. The plaintiff proceeded to file an application for summary judgment for the outstanding tax due but the defendant filed an application to

strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(a), (c) or (d) of the RHC 1980. It was the defendant's contention that the plaintiff's claim was wrong in law because the plaintiff had not proven that it had served the notices of assessment for the years of assessment 2002, 2003 and 2004 on the defendant even though this was challenged by the latter. The defendant argued that the plaintiff had to show credible and cogent evidence of the posting itself before invoking the benefits of the deeming provision on effective service of the notices of assessment.

Held, allowing the plaintiff's claim for summary judgment with costs and dismissing the defendant's application to strike out the plaintiff's claim with costs:

(1) Section 145 of the Income Tax Act 1967 ('the Act'), the specific provision in the Act on service of notices, did not anywhere spell out that a register of some record of notices sent out daily by ordinary post should be maintained as proof of posting. Any reading of such a requirement into s 145 of the Act would be tantamount to imposing additional financial and manpower burden on the government. As such, it was not reasonable at all to read into s 145 a further requirement that the plaintiff should keep or maintain a record or register of all notices sent out daily or of undelivered notices returned by the postal authorities before service of notices are accepted or deemed to have been validly effected (see para 23).

(2) This was a fit and proper case to call in aid the provision of s 114(e) of the Evidence Act 1950, which allows the court to presume that judicial and official acts had been regularly performed. In the present case, the plaintiff through its witnesses had confirmed that it had posted the said notices of assessment to the defendant's last known address, which was the same as its present address. The defendant had failed to adduce any credible evidence as to why this court should desist from invoking the presumption under s 114(e) in favour of the plaintiff. Raising mere surmises, suspicion or the likelihood of the notices being mislaid by the postal authorities or being otherwise lost in transit within the department itself or otherwise was not sufficient to displace the application of the presumption. Further, the evidence of the plaintiff's witnesses taken collectively confirmed the sequence of administrative steps taken and the process in place for the posting of notices like those in issue in this instant case. In the circumstances, the evidence of the plaintiff's witnesses that the various steps involved upon issue of a notice of assessment had been performed was sufficient to trigger the presumption to infer and conclude that their official acts had been regularly performed in the common course of conduct of the business and operations of the plaintiff (see para 24).

(3) Although the defendant through its director had affirmed in his affidavit

that the defendant had not received the said notices of assessment, the averment had not disclosed the source of the director's information or belief. As the director did not have personal knowledge of this information, his averment ought to be rejected as hearsay (see para 31).

[Bahasa Malaysia summary

Plaintif telah mendakwa bahawa defendan pembayar cukai telah gagal membayar keseluruhan anggaran bulanan dan ansuran bulanan cukai pendapatan bagi tahun-tahun taksiran 2002, 2003 dan 2004. Apabila defendan gagal mengemukakan hasil cukainya untuk tahun-tahun taksiran 2002-2004 dalam tempoh yang ditetapkan, plaintif telah mentaksir defendan dengan cukai pendapatan untuk tahun-tahun taksiran 2002, 2003 dan 2004. Menurut plaintif, tiga notis taksiran untuk tiga tahun taksiran tersebut telah dipos dan disampaikan kepada defendan di alamat terakhirnya yang diketahui. Apabila defendan gagal membayar keseluruhan cukai pendapatan untuk tiga tahun taksiran tersebut dalam tempoh 30 hari dari tarikh penyampaian tiga notis taksiran itu, plaintif telah mengenakan kenaikan cukai sebanyak 10% dan 5% ke atas keseluruhan cukai pendapatan yang perlu dibayar dan tertunggak. Walau bagaimanapun, defendan telah gagal menyelesaikan keseluruhan cukai pendapatan yang perlu dibayar itu. Plaintif telah memulakan tindakan terhadap defendan kerana kegagalannya untuk membayar keseluruhan cukai pendapatan yang perlu dibayar dan tertunggak kepada plaintif bagi tahun-tahun taksiran 2002, 2003 dan 2004 termasuklah kenaikan yang dikenakan yang kesemuanya berjumlah RM648,692.40. Defendan pula bertindak memfailkan pembelaan dengan mendakwa, antara lain, bahawa jumlah yang dituntut adalah salah dan bahawa notis-notis taksiran untuk ketiga-tiga tahun taksiran tersebut tidak pernah disampaikan dan diterima. Plaintif selanjutnya memfailkan permohonan untuk penghakiman terus bagi tunggakan cukai yang perlu dibayar tetapi defendan telah memfailkan permohonan untuk membatalkan writ dan penyataan tuntutan plaintif di bawah A 18 k 19(1)(a), (c) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980. Adalah hujah defendan bahawa tuntutan plaintif adalah salah dari segi undang-undang kerana plaintif tidak membuktikan bahawa ia telah menyampaikan notis-notis taksiran untuk tahun-tahun taksiran 2002, 2003 dan 2004 ke atas defendan meskipun ini telah dicabar oleh defendan. Defendan berhujah bahawa plaintif perlu menunjukkan keterangan yang boleh dipercayai dan meyakinkan tentang pengeposan itu sendiri sebelum menggunakan peruntukan yang dianggap memberi manfaat ke atas penyampaian berkesan notis-notis taksiran itu.

Diputuskan, membenarkan tuntutan plaintif untuk penghakiman terus dengan kos dan menolak permohonan defendan untuk membatalkan tuntutan plaintif dengan kos:

(1) Seksyen 145 Akta Cukai Pendapatan 1967 ('Akta'), peruntukan spesifik

dalam Akta tersebut berhubung penyampaian notis, tidak menyebut bahawa perlu ada daftar rekod notis-notis yang dihantar keluar setiap hari melalui pos biasa sebagai bukti pengeposan. Apa-apa bacaan tentang keperluan sedemikian dalam s 145 Akta adalah sama seperti mengenakan beban kewangan tambahan dan sumber manusia ke atas kerajaan. Oleh itu, adalah tidak munasabah langsung untuk membaca s 145 dengan keperluan selanjutnya bahawa plaintif patut menyimpan atau mengekalkan satu rekod atau daftar untuk semua notis-notis yang dihantar keluar setiap hari atau notis-notis yang tidak sampai yang telah dikembalikan oleh pihak berkuasa pos sebelum penyampaian notis-notis diterima atau dianggap telahpun dilaksanakan dengan sah (lihat perenggan 23).

(2) Ini adalah kes sesuai dan wajar untuk memohon bantuan peruntukan s 114(e) Akta Keterangan 1950, yang membenarkan mahkamah mengandaikan bahawa tindakan kehakiman dan tuntutan rasmi telah dilaksanakan dengan teratur. Dalam kes ini, plaintif melalui saksi-saksinya mengesahkan bahawa ia telah menghantar melalui pos notis-notis taksiran tersebut kepada alamat terakhir defendan yang diketahui, yang sama dengan alamatnya sekarang. Defendan telah gagal mengemukakan apa-apa keterangan yang boleh dipercayai tentang kenapa mahkamah ini patut berhenti daripada menggunakan andaian di bawah s 114(e) yang menyebelahi plaintif. Dengan menimbulkan andaian, syak wasangka semata-mata atau kemungkin notis-notis itu tersalah letak oleh pihak berkuasa pos atau hilang dalam transit dalam jabatan itu sendiri atau selainnya tidak mencukupi untuk menggantikan permohonan andaian itu. Selanjutnya, keterangan saksi-saksi plaintif secara kolektif mengesahkan turutan langkah-langkah pentadbiran yang diambil dan proses yang wujud bagi pengeposan notis-notis sepertimana dalam isu kes ini. Dalam keadaan berikut, keterangan saksi-saksi plaintif bahawa pelbagai langkah-langkah yan terlibat dalam isu notis taksiran telahpun dilaksanakan adalah menukupi untuk mewujudkan andakan bagi membuat inferens dan kesimpulan bahawa tindakan rasmi mereka sentiasa dilakukan dalam pelaksanaan biasa perjalanan perniagaan dan operasi plaintif (lihat perenggan 24).

(3) Walaupun defendan melalui pengarahnya telah mengesahkan dalam afidavitnya bahawa defendan tidak menerima notis-notis taksiran tersebut, penegasan itu tidak menyatakan sumber maklumat atau kepercayaan pengarah. Oleh kerana pengarah itu tidak mempunyai pengetahuan peribadi tentang maklumat ini, penegasannya patut ditolak sebagai dengar cakap (lihat perenggan 31).]

Notes

For a case on common course of business, see 7(2), *Mallal's Digest* (4th Ed, 2013 Reissue) para 2422.

For cases on assessment, see 10, *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2384–2414.

For cases on document, see 7(1), *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1979–1991.

Cases referred to

Amanah Merchant Bank Bhd v Lim Tow Seng & Anor [1994] 1 MLJ 413; [1994] 2 CLJ 1, SC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Chew Kam Meng v Kerajaan Malaysia [2002] 3 MLJ 364, HC (refd)

Kerajaan Malaysia v Syarikat Muliajaya Sdn Bhd [2010] MLJU 647, HC (folld)

Southern Finance Bhd (formerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor [2006] 6 MLJ 673, HC (refd)

Legislation referred to

Companies Act 1965

Evidence Act 1950 s 114, 114(e)

Income Tax Act 1967 ss 103(5), (6), 103A(3), (6), (7), 103(6), 107C(5), (8), (9) 142(1), 145, 145(2)

Limitation Act 1953

Postal Services (Postage Rates) Rules 2005 r 12

Postal Services (Postage Rates) Rules 2010

Rules of the High Court 1980 O 18 r 19(1)(a), (c), (d), O 41 r 5(1)

Rules of Court 2012

Nor Asmah bt Adam (Legal Counsel, Inland Revenue Board of Malaysia) for the plaintiff.

Vivekanandan Periasamy (Selvam, Nanda & Partners) for the defendant.

Lee Swee Seng JC:

[1] The plaintiff is the Government of Malaysia and more particularly the Inland Revenue Board of Malaysia. The defendant is Central Strata Sdn Bhd (272403-P), a company incorporated in Malaysia under the Companies Act 1965 with its registered office at 90, 1st Floor, Jalan Sultan Yussuff, 30000 Ipoh, Perak.

PROBLEM

[2] For the year of assessment 2002–2004, the accounting period or the taxable period of the defendant was from 1 October 2001–30 September 2002, from 1 October 2002–30 September 2003 and from 1 October 2003–30 September 2004.

[3] The defendant submitted to the plaintiff an estimated income tax payable for year of assessment 2002 and 2004 in the form for estimated tax on 30 August 2001 and 30 August 2003.

[4] The estimated income tax for the years of assessment 2002 and 2004 submitted by the defendant was RM360,000 and RM0.00.

[5] The estimated income tax for year of assessment 2002 that has to be paid by instalments by way of equal monthly instalments on the 10th day of every month commencing the second month during the period is as set out below:

No	Date of Payment	Amount of monthly instalment(RM)
1	10 November 2001	30,000
2	10 December 2001	30,000
3	10 January 2002	30,000
4	10 February 2002	30,000
5	10 March 2002	30,000
6	10 April 2002	30,000
7	10 May 2002	30,000
8	10 June 2002	30,000
9	10 July 2002	30,000
10	10 August 2002	30,000
11	10 September 2002	30,000
12	10 October 2002	30,000
TOTAL	360,000	

[6] On 24 October 2002 and on 12 September 2003 the director general of inland revenue issued a directive and served by post to the last known address of the defendant for the defendant to pay the income tax for year of assessment 2003–2004 by way of instalments based on the dates and amount stated in the directive under s 107C(8) of the Income Tax Act 1967 as follows:

YEAR OF ASSESSMENT 2003

No	Date of Payment	Amount of monthly instalment(RM)
1	10 November 2002	30,000
2	10 December 2002	30,000
3	10 January 2003	30,000
4	10 February 2003	30,000
5	10 March 2003	30,000
6	10 April 2003	30,000
7	10 May 2003	30,000

8	10 June 2003	30,000
9	10 July 2003	30,000
10	10 August 2003	30,000
11	10 September 2003	30,000
12	10 October 2003	30,000
TOTAL	360,000	

YEAR OF ASSESSMENT 2004

No	Date of Payment	Amount of monthly instalment(RM)
1	10 November 2003	30,000
2	10 December 2003	30,000
3	10 January 2004	30,000
4	10 February 2004	30,000
5	10 March 2004	30,000
6	10 April 2004	30,000
7	10 May 2004	30,000
8	10 June 2004	30,000
9	10 July 2004	30,000
10	10 August 2004	30,000
11	10 September 2004	30,000
12	10 October 2004	30,000
TOTAL	360,000	

[7] The defendant failed to pay the whole of the monthly estimates and monthly instalments of income tax for years of assessment 2002–2004 on the dates of payment and as a result, an increase of 10% amounting to RM36,000, RM36,000 and RM36,000 respectively were imposed and added to the amount payable as follows:

YEAR OF ASSESSMENT 2002

No	Date of Payment	Amount of Monthly Instalment (RM)	Increase of 10%
1	10 November 2001	30,000	3,000
2	10 December 2001	30,000	3,000
3	10 January 2002	30,000	3,000
4	10 February 2002	30,000	3,000
5	10 March 2002	30,000	3,000
6	10 April 2002	30,000	3,000
7	10 May 2002	30,000	3,000
8	10 June 2002	30,000	3,000
9	10 July 2002	30,000	3,000

10	10 August 2002	30,000	3,000
11	10 September 2002	30,000	3,000
12	10 October 2002	30,000	3,000
TOTAL	360,000	36,000	

YEAR OF ASSESSMENT 2003

No	Date of Payment	Amount of Monthly Instalment (RM)	Increase of 10%
1	10 November 2002	30,000	3,000
2	10 December 2002	30,000	3,000
3	10 January 2003	30,000	3,000
4	10 February 2003	30,000	3,000
5	10 March 2003	30,000	3,000
6	10 April 2003	30,000	3,000
7	10 May 2003	30,000	3,000
8	10 June 2003	30,000	3,000
9	10 July 2003	30,000	3,000
10	10 August 2003	30,000	3,000
11	10 September 2003	30,000	3,000
12	10 October 2003	30,000	3,000
TOTAL	360,000	36,000	

YEAR OF ASSESSMENT 2004

No	Date of Payment	Amount of Monthly Instalment (RM)	Increase of 10%
1	10 November 2003	30,000	3,000
2	10 December 2003	30,000	3,000
3	10 January 2004	30,000	3,000
4	10 February 2004	30,000	3,000
5	10 March 2004	30,000	3,000
6	10 April 2004	30,000	3,000
7	10 May 2004	30,000	3,000
8	10 June 2004	30,000	3,000
9	10 July 2004	30,000	3,000
10	10 August 2004	30,000	3,000
11	10 September 2004	30,000	3,000
12	10 October 2004	30,000	3,000
TOTAL	360,000	36,000	

[8] The defendant failed to submit the company income tax form (Form C) for years of assessment 2002–2004 to the plaintiff on or before the last day six

or seven months after the close of the accounting period of the defendant and as a result of which, for the years of assessment 2002–2004 the defendant was assessed with income tax amounting to RM420,131.96, RM24,000 and RM24,000.

[9] According to the plaintiff, the notices of assessment for years of assessment 2002–2004 stated above dated 19 January 2005, 22 June 2006 and 22 June 2006 were posted and served on the defendant at the last known address.

[10] As the defendant failed to pay the whole of the income tax which was still outstanding within 30 days from the date of service of the notices of assessment, an increased tax calculated at 10% amounting to RM42,013.19, RM2,400 and RM2,400 respectively were imposed and added to the overall income tax still outstanding for the years of assessment.

[11] However the defendant still failed to settle the whole of the income tax still outstanding during the period given and as a consequence an increase in tax of 5% amounting to RM23,107.25, RM1,320 and RM1,320 respectively were imposed and added to the overall income tax still outstanding for the years of assessment 2002–2004.

[12] The plaintiff asserted that it is entitled to recover the amount of income tax still outstanding together with the 10% and 5% increases imposed on the defendant as taxes due and owing.

[13] The plaintiff stated that to date the defendant has still failed to pay the plaintiff the whole of its income tax due and owing to the plaintiff for the years of assessment 2002–2004 including the increases imposed which together amounted to RM648,692.40.

PRAYERS

[14] In encl 7 filed on 31 March 2011, the plaintiff applied for summary judgment against the plaintiff for the sum of RM648,692.40 together with interest at the rate of 8%pa from the date of judgment to realisation and costs. The grounds stated in the application are as follows:

(a) s 107C(5) of the Income Tax Act 1967 clearly provides that every person who submitted an estimate of income tax payable for any year of assessment shall pay the same by equal monthly instalments according to the number of monthly instalments for the period in question and under s 107C(9) if the defendant fails to so pay the instalments, an increase of 10% tax shall be imposed for each instalment that has not been paid;

(b) s 103A(3) of the Income Tax Act 1967 clearly provides that the tax to be paid under an assessment shall be due for payment upon service of thenotice of assessment on the taxpayer irrespective of whether the taxpayer appeals against the said assessment;

(c) ss 103A(6), 103(5), 103A(7) and 103(6) of the Income Tax Act 1967, clearly provides that any increase in tax imposed under the above provisions is recoverable as tax due and payable;

(d) a certificate under s 142(1) of the Income Tax Act 1967 signed by the senior assistant director stating the name and address of the defendant and the amount of tax due and payable shall be conclusive evidence before the court for judgment to be entered for the amount in the certificate;

(e) there is no defence on the merits; and

(f) the affidavit in support of one Piramanayaki a/p K Arunachalam shall be read in support of the application.

[15] The defence filed alleged inter alia that the sum claimed is wrong, that the notice of assessment had not been served and received and that the claim is barred by limitation under the Limitation Act 1953.

[16] The defendant upon been served with the plaintiffs application for summary judgment proceeded on the offensive and filed an application in encl 15 on 6 May 2011 to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(a) or (c) or (d) of the Rules of the High Court 1980 ('RHC') and or under the inherent jurisdiction of the court. The application was accompanied by a certificate of urgency requesting the court to fix the application for hearing on 9 May 2011 which was the first date fixed for hearing of the summary judgment application by the plaintiff. The grounds stated are that:

(a) the plaintiff's claim is not in order and wrong in law. The notice of assessment which was said by the plaintiff to have been served by post on 24 October 2002 and on 12 September 2003 with reference to the last known address of the defendant has not been proved by the plaintiff even though this was challenged by the defendant. The plaintiff's claim ought to be dismissed on this ground alone; and

(b) that the plaintiff's claim is barred by limitation under the Limitation Act 1953.

[17] At the hearing of both the applications, both counsel agreed that should the court decide to enter summary judgment, then the court should also as a

corollary dismiss the defendant's application to strike out the plaintiff's claim. Indeed one is the flip side of the other.

[18] Learned counsel for the defendant further limited his argument on whether there was in fact evidence of posting of the notice of assessment before the deeming provision of service may be invoked. Thus all other grounds stated above have been abandoned by the defendant.

PRINCIPLES

Whether the plaintiff has posted the notice of assessment to the defendant to allow for s 145(2) of the Income Tax Act 1967 to be invoked

[19] The defendant contended that it had not received the notice of assessment that the plaintiff claimed to have served. The defendant further contended that when the alleged posting of the notice of assessment is being challenged then the plaintiff no longer could rely on the deeming provision on service of the notice after it has been posted.

[20] The defendant argued that the plaintiff must show credible and cogent evidence of the posting itself before invoking the benefits of the deeming provision on effective service of the notices of assessment.

[21] When asked what would he be expecting the plaintiff to show as evidence of that, learned counsel for the defendant said that it would be some written record or register kept by the plaintiff to show that the notices had been sent, not unlike what a legal firm has in its recording in a book for instance that for a particular day, the notices sent out with particulars of the name and address of the intended recipients.

[22] Section 145(2) of the Act provides as follows:

> Service of notice
>
> 145(2) *A notice relating to tax which is sent by ordinary or registered post shall be deemed to have been served on the person (including a partnership) to whom it is addressed on the day succeeding the day on which the notice would have been received in the ordinary course of post if it is addressed —*
>
> (a) in the case of a company, partnership or body of persons having a registered office in Malaysia —
>
> (i) to the registered office;
>
> (ii) *to its last known address*; or
>
> (iii) to any person authorized by it to accept service of process;

(b) in the case of a company, partnership or body of persons not having a registered office in Malaysia —

(i) to any registered office of the company, partnership or body (wherever that office may be situated);

(ii) to the principal place of business or other activity of the company, partnership or body (wherever that place may be situated); or

(iii) to any individual authorized (by or under the law of any place where the company partnership or body is incorporated, registered or established) to accept service of process; and

(c) in the case of an individual, to his last known address. (Emphasis added.)

[23] The same argument as that advanced by the defendant had been canvassed before. I would gladly adopt the approach taken by my learned brother Varghese George JC (as he then was) in *Kerajaan Malaysia v Syarikat Muliajaya Sdn Bhd* [2010] MLJU 647 where His Lordship in interpreting s 145(2) of the Act, opined as follows:

> The defendant's contention, as stated earlier, is that the mere evidence of the process or procedure in place at the plaintiff's office in respect of postage of notices is insufficient and in the least that there must be some record or register to show that the specific notices had been handed in for posting before it is deemed as been served under that section.
>
> Section 145(2) provides that a notice relating to tax which is sent by ordinary post shall be deemed to have been served on the day succeeding the day on which the notice would have been received in the ordinary course of post provided it is addressed in the case of a company to its registered office or to its last known address or to any person authorised by it to accept service of process. It must be pointed out that s 145 (the specific provision in the Income Tax Act 1967 on service of notices) *does not anywhere spell out that a register or some record of notices sent out daily by ordinary post must be maintained as proof of posting.* No such requirement is also stipulated in respect of notices sent out by registered post. Section 145(3) only covers a situation where a notice sent by registered post remains uncollected and in such event the need is expressed for the officer in charge of a post office to verify by a sworn affidavit that there has been tendered for delivery to the addressee a registered letter before the notice is deemed to have been served. What can be deduced in my assessment from a reading of the said section as whole is that it was the intent behind the provision that there should be flexibility in the procedural aspects of effecting service of the notices by LHDN on tax payers. That to me is also consistent with the larger object behind the legislation, the Income Tax Act 1967 and the concomitant obligation of all persons deriving chargeable income in the country to annually pay taxes. The social and fiscal objectives in raising taxes for the operations of the government and for development purposes in the country require me to give that provision a purposive and liberal interpretation in the circumstances. I also accept the contention of counsel for the plaintiff that apart from such a requirement being not part of the law, any reading into s 145 of such a requirement would be tantamount to imposing additional financial and manpower burden on

the government. Needless to say this could translate into additional taxes for all taxpayers, the majority of whom diligently meet their tax obligations on time.

I therefore hold that *it is not reasonable at all to read into s 145 a further requirement that the plaintiff should keep or maintain a record or register of all notices sent out daily or of undelivered notices returned by the postal authorities before service of notices are accepted or deemed to have been validly effected.* The observations of James Foong J (as His Lordship then was) in *Kerajaan Malaysia v Sun City Development Sdn Bhd* (unreported) referred to by counsel for defendant, it must be noted, were made in an appeal against an O14 judgment.

His Lordship in holding that there was a triable issue there stated as follows:

> There should be evidence to indicate the procedure adopted by the plaintiff in posting letters for the department and perhaps a record book to indicate that on such a day a letter addressed to the defendant at the address listed on the envelope was among one of many others being posted in the ordinary course of the plaintif'fs business.

I do not consider this observation of James Foong J to be a conclusive ruling that provisions of s 145 require a record book to be maintained. It was an evidentiary issue which His Lordship clearly left open as is obvious from a reading of the sentence in its entirety. In any event there is nothing in the judgment to show that s 114 illustration (e) of the Evidence Act 1950 featured in the arguments before the court there at that stage of the proceedings. (Emphasis added)

[24] This is a fit and proper case to call in aid the provision of s 114(e) of the Evidence Act 1950 and my learned brother Varghese George JC (as he was then) has very eloquently explained why in a case like this, the court should safely invoke the assistance of s 114(e) of the Evidence Act 1950 as follows in the *Syarikat Muliajaya*'s case. I cannot improve on what my learned brother had expounded and so I would set out *in extenso* his exegesis as follows:

Commenting on the general purport of s 114 of the Evidence Act 1950, Thompson CJ had this to say in *Synn Lee & Co Ltd v Bank of China* [1962] MLJ 395:

> Now, s 114 of the Evidence Ordinance is not mandatory but gives the court a discretion. It says that the court may presume the existence of facts which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, and it furnishes a number of illustrations of circumstances in which this discretion may be exercised. (Emphasis added.)

The presumption permitted to be inferred by the courts under the said illustration (e) to s 114 has been resorted to by the court in various other scenario involving official or judicial acts. Hishamudin Yunus J in *Bank Kerjasama Rakyat Malaysia Bhd v YM Tunku Maryam Tunku Zainal Abidin & Anor* [2000] 7 CLJ 249 applying the

presumption in a case involving an order for sale made by a *pentadbir tanah daerah* summed up the policy and intent behind the presumption in the following manner:

> The rule embodied in this illustration is a particular application of the maxim 'omnia praesumuntar rite essa acta', ie, all acts are presumed to have rightly and regularly done (*Sarkar on Evidence*, (15th Ed), 1999 p 1659).
>
> 'Regularly performed' means performed with due regard to procedure (*Sarkar on Evidence* p 1663 citing *Jagdeo v Bulaki,* 68 IC 226).
>
> The basis of the presumption is that normally courts of justice uphold official and judicial and other acts rather than render them inoperative. The presumption arises wholly on grounds of public policy (*Sarkar on Evidence*, p 1660 citing *Kailash Chand Gaggar v State of Assam* (1993) (2) Crimes 700 702 (Gau)).
>
> Thus, based on the above authority, this court is entitled to presume (unless it is proved to the contrary) that every step in the foreclosure procedure as prescribed by the National Land Code had been duly complied with by the PTD. In short, there is a presumption of validity of the sale, including the order for sale. This presumption may be rebutted. But the burden was on the defendants to rebut by adducing evidence showing that the official acts (the issuing of the order for sale and the carrying out the sale) were not regularly performed.

The defendant has failed to adduce any credible evidence to my satisfaction as to why this court should desist from invoking the presumption under s 114 of the Evidence Act 1950*in favour of the plaintiff. Raising mere surmises, suspicion or the likelihood of the notices being mislaid by the postal authorities or being otherwise lost in transit within the department itself or otherwise is not sufficient to displace the application of the presumption.* The non-production by SP3 of the counterfoil issued to him by the postal authorities upon submitting the daily load of outgoing mail is also a non-issue here, in my view, as in any event such counterfoil would not have been of any assistance to bear out and identify each individual notice so posted.

I am satisfied that there are good and sound public policy grounds why the presumption should be opted for and applied in this case. If further evidence was required under s 145(2) of the Income Tax Act 1967 in respect of posting of the notices, this would have been expressly set out there in that provision. To me, it was precisely for situations like this that the presumption pursuant to s 114 of the Evidence Act 1950 was provided for under general law. *The policy behind s 114 is to waive the intricacies of proof required, unless of course reasons are shown to the contrary, to enable the courts to exercise its discretion, especially where illustration (e) is relevant, to presume that judicial and official acts have been rightly and regularly done for the smooth carrying out and realisation of administrative and judicial functions and objectives.*

The evidence of the plaintiff's witnesses taken collectively confirms what the sequence of administrative steps taken and the process in place for the posting of notices like those in issue in this instant case were. Nothing has been shown for disbelieving their evidence.

Their evidence was that the various steps involved upon issue of a *notis taksiran* had been performed and I hold that such evidence is sufficient to trigger the presumption for the court to infer and conclude that their official acts have been

regularly performed (Court of Appeal in *Aseam Credit Sdn Bhd v Eminent Avenue Sdn Bhd* [2008] 1 MLJ 441 at p 450) in the common course of conduct of the business and operations of the plaintiff. This is the conclusion that this court make from the evidentiary facts placed before it by the plaintiff. (Emphasis added.)

[25] If indeed Parliament had wanted the Inland Revenue Department to keep a record of proof of posting, then it would have stipulated posting by way ofcertificate of posting. For that mode, the rubber stamp of the post office is affixed onto the slip duly filled up with the addressee's name and address which letter so addressed is handed to the post office before the rubber stamp of the post office is affixed. Rule 12 of the Postal Services (Postage Rates) Rules 2005 PU(A) 80/2005 as then applicable to the facts herein reads:

A certificate of posting may be obtained for each postal article for a fee of twenty cents, being the value of stamps which shall be affixed to the certificate.

[26] The latest Postal Services (Postage Rates) Rules 2010 PU(A) 225/2010 now provides as follows:

A certificate of posting issued by the licensee may be obtained for each postal article posted for a fee of sixty sen, being the value of stamps which shall be affixed to the certificate.

[27] At any rate where technology has improved by leaps and bounds, it does not make sense to do a redundant work in printing out a list of letters sent where millions of notices of assessment would be sent out every year to the millions of tax payer in the country. It would be sufficient for an officer to affirm on oath as has been done here by affidavit that the notices of assessment has been duly sent out. There is no evidence by the defendant as to why the plaintiff should discriminate against it where a notice of assessment that has been printed out is nevertheless not sent out by ordinary mail. Neither is there any reason why the plaintiff should have acted mala fide in refusing to send the notice of assessment to the defendant and thus depriving it of its' opportunity to appeal to the Special Commissioners of Income Tax.

[28] I am aware that *Syarikat Muliajaya* was a case where the court heard the witnesses at a full trial and not a summary judgment hearing via affidavits evidence. However even at the summary judgment stage it is incumbent on the court to evaluate critically the quality of the evidence adduced by the affidavits and to assess if the issues raised are really triable issues. In other words would the mere 'say-so' of the defendant that it had not received the notice of assessment be sufficient when it had not been shown why this court should disbelieve the plaintiff, a government agency charged with collection of taxes, when it said that it had sent out the notices of assessment coupled with the

deeming provision on service. I bear in mind the dicta of Mohamed Azmi SCJ, when speaking on behalf of the majority in the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at p 408, observed:

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that *the said issue is triable*. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 had this to say at p 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, *this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.*
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
>
> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. *Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.* In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, *the court must go one step further and determine whether they are triable.* This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue. (Emphasis added.)

[29] Whilst I do not want to sound presumptuous, I may safely say that no useful purpose would be served by going for trial. One may expect the evidence given in a full trial on this issue to be little different from that adduced by the Inland Revenue Department in *Syarikat Muliajaya*'s case.

[30] I would say it is incumbent on the tax payer to check with the Inland Revenue Department if after submission of the estimated tax to be paid, there is no reply from the Inland Revenue Department, more so as here where the defendant has engaged a tax agent in the firm of Albert Khoo & Co, Public Accountants, AF - 0396 to submit the CP 204 Forms, it being the relevant form provided for submitting an estimated tax to be paid by a company. Surely

a prudent tax agent would want to know if there is any variation between the estimated tax and the final tax as assessed that would need to be paid, for if there is, a penalty might be imposed for late payment. In fact if there is anyone who has personal knowledge as to the fact that the notices of assessment were not received, it should be the tax agent Albert Khoo & Co as the defendant had given the address of Albert Khoo & Co is the current address of correspondence which is No 9, (Ground Floor) Jalan Lau Ek Ching, 30300, Ipoh, Perak. See exh PKA4 in encl 19 which is the affidavit in reply of the plaintiff. The said Albert Khoo & Co had also written to the plaintiff enclosing Form CP 204 for year of assessment 2004 as can be seen in the same exh PKA4.

[31] Messrs Albert Khoo & Co would be the best person to say if they have received the said notices of assessment. They would have personal knowledge as to whether the notices of assessment had been received or not and not the defendant or its director Mr Lim Chin Khai who had affirmed an affidavit (encl 12 para 6) to say that the defendant had not received the notices of assessment. For such a crucial fact, such an averment by Mr Lim Chin Khai is hearsay and ought to be rejected.

[32] I am not unaware of the provision of O 41 r 5(1) of the RHC which is the same in the new Rules of Court 2012 ('ROC'). As was stated in *Southern Finance Bhd (formerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor* [2006] 6 MLJ 673 at pp 686–687:

> Though under O 41 r 5(1) of the RHC, 'an affidavit may contain only such facts as the deponent is able of his own knowledge to prove', yet under r 5(2), of the same order, affidavits 'sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources or grounds thereof. Order 41 r 5 of the RHC reads as follows:
>
> > 5 Contents of affidavit
> >
> > (1) Subject to Order 14 rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38 rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
> >
> > (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

[33] Whilst such statements of information or belief with the sources and grounds thereof are permitted for an interlocutory application, yet the defendant through its director Mr Lim Chin Khai who had affirmed the affidavit in encl 12 to say that the defendant had not received the said notices of assessment had not disclosed the source of this information or belief. He had stated at para 1 at the outset of his affidavit on behalf of the defendant that what

he deposed to were facts within his personal knowledge or that which is derived from records that he had access to. He certainly does not have personal knowledge as the notices were sent as requested to his tax agent Messrs Albert Khoo & Co. For such a crucial and critical information, one would have expected him to disclose his source of knowledge of this pivotal fact if it is not within his personal knowledge, but he had not. He could have asked Messrs Albert Khoo & Co to affirm an affidavit to state the facts as they know on the non-receipt of the notices of assessment but this had not been forthcoming.

[34] On the other hand the plaintiff in its affidavit in reply in encl 19 where by para 8 thereof it was affirmed once again that 'the Notices of Assessment had been posted to the defendant and that these Notices had not been returned to the plaintiff on account of non-service'.

[35] Here there is not just one but three separate notices of demand — the first dated 19 January 2005 and the second and third both dated 22 June 2006. It is rather unlikely that all three notices had not been received by Albert Khoo & Co and indeed if that is so, then it is for Albert Khoo & Co to affirm an affidavit to that effect. I would refer to the case of *Chew Kam Meng v Kerajaan Malaysia* [2002] 3 MLJ 364 at p 370 where such an allegation of non-receipt of a notice of assessment had been raised:

> Non-receipt of letters
>
> The notice of assessment dated 20 June 1987 was addressed to the applicant at No 10 Jalan Bell, 10350 Pulau Pinang. This is the same address as stated by the applicant in the agreement between himself as the vendor of the said property and one Inmen Sdn Bhd as purchaser, which said agreement the applicant had exhibited. However, in his affidavit in support of this application the applicant had averred that he had sold the said land to Cariwang. This discrepancy as to whether the purchaser was Inmen Sdn Bhd or Cariwang has not been explained in any affidavit nor in the submission of the applicant.
>
> In any case, I note that all copies of letters which the respondents had said they had been sent to the applicant were all addressed to the applicant at No 22 King Street, 10200 Pulau Pinang. This is the address which the applicant had stated in his notice of withdrawal of his appeal dated 2 August 1991, addressed to the chairman of the Income Tax Appeal Commission. This is the same address that the applicant had also stated in the affidavit in support of this application and in his affidavit in reply. *There is no reason to doubt that the respondents would have in actual fact posted the letters. If one letter is not received it is possible to assume that it might not have been delivered. But in this case the applicant has said that he had not received each of the letters referred to and the address still remains the same. I am of the view that it is appropriate to invoke* s 114(e) of the Evidence Act 1950*which allows the court to presume that judicial and official acts have been regularly performed.* In this case the act of the respondents is an official act. The respondents acting through their officers have extended copies of those letters and addressed them to the applicant's last known address as averred in his affidavits. That last known address is the same as the present

address of the applicant. I find, therefore, that the respondents have done their duty by posting the letters and it must be presumed that the applicant must have received these letters.

[36] The meaning of the expression 'shall be deemed served' has been expounded in a number of cases. The Supreme Court case of *Amanah Merchant Bank Bhd v Lim Tow Seng & Anor* [1994] 2 CLJ 1 at pp 4–6 gave a very clear explanation on what it means:

> The practical necessity for a deeming provision such as that in cl 10 in a form of guarantee used by a bank where personal contact with its guarantors is not always feasible, is readily apparent. In my opinion the words 'shall be deemed' in cl 10 are the equivalent of 'shall be regarded as', and consequently the fact that the defendant did not actually receive the demand, which the bank had sent him pursuant to cl 10, is immaterial and can afford no defence to the action.

In *Rex v Westminster Unions Assessment Committee, Ex parte Woodward & Sons* [1917] 1 KB 832, the appellate division of the King's Bench considered the meaning of the words 'shall be deemed to have been served and received' as used in s 65 of the Valuation (Metropolis) Act 1869, which reads:

> All orders and notices under this Act … shall be in writing or print, or partly in writing and partly in print … and all orders, notices and documents required … to be served on or sent to any person or body of persons corporate or unincorporate may be either delivered to such person or the clerk of such body, or left at the usual place of abode of such person or clerk, or at the office of such clerk or body, or (if such abode or office cannot on reasonable inquiry be discovered) at the premises to which the order, notice, or document refers.
>
> They may also be served and sent by post, by a prepaid letter, addressed to such person, or to the office of such body or to their clerk, and, if sent by post, shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post. (Emphasis added.)

Viscount Reading CJ at p 838 said:

> A notice prepaid and addressed as directed by s 65 if sent through the post 'shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post'. *That provision applies to a case where in fact the notice has not been received, otherwise it has no meaning. The intention is to treat as a fact something which has not been established as a fact — even something which can be shown not to be a fact.* The section continues: 'and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post'. In my view, when those conditions have been performed it must be taken as concluded that the notice has been served and received …

A Although the words 'shall be deemed' in the above case was considered in the context of the statutory provisions, in our view, we can draw an analogy from this case that, in the present appeal, *it is sufficient to prove the notice of demand by sending it through the post in an envelope addressed to the last known place of address of the defendant, and once this is established the deeming provision would apply as in the case cited above.* (Emphasis added.)

B

[37] To this date the defendant has not shown that it had applied to the Special Commissioners of Income Tax to extend time to appeal against the notice of assessment imposing the income tax if indeed that right is said to have been taken away by the non-service of the notices of assessment.

C

[38] I am satisfied that the notices of assessment had been posted to the defendant's last known address and that they had been deemed served on the defendant.

D

PRONOUNCEMENT

[39] In the circumstance, and the defendant through its counsel having abandoned the other grounds of challenge to the plaintiff's claim, I granted summary judgment for the sum claimed in encl 7 with interest at 5%pa and fixed costs as per the Rules of Court 2012 at RM4,000. The certificate under s 142(1) of the Income Tax Act 1967 exhibited as PKA2 certifying the amount outstanding is sufficient authority for the court to give judgment for that amount.

E

F

[40] As agreed earlier by both counsel for the parties, with my decision to grant summary judgment, I would have to dismiss the defendant's application to strike out the plaintiff's claims. Thus encl 15 filed by the defendant was dismissed with costs of RM4,000.

G

Plaintiff's claim for summary judgment allowed with costs and defendant's application to strike out plaintiff's claim dismissed with costs.

H

Reported by Kohila Nesan

I